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No. 10-569

IN THE

Supreme Court of the United States

JACK CONWAY, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE COMMONWEALTH OF KENTUCKY,

Petitioner,

—v.—

BART MCQUEARY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, in the absence of a final judgment concerning Respondent's status as a prevailing party, this Court should exercise jurisdiction to review the Sixth Circuit's "contextual and case specific inquiry" standard for determining whether a merits-based preliminary injunction, followed by repeal of the challenged statutes, can support a finding of prevailing party status.

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STATEMENT OF THE CASE

Factual Background

In 2006, Kentucky enacted HB 333 and SB 93 — two virtually identical bills that barred a variety of activities within 300 feet of funerals, and delegated to private individuals the authority to approve the content of speech made within earshot or eyesight of funeral participants. Petitioner's Appendix (Pet. App.) 30a-31a. The Kentucky Legislature enacted the measures in response to the activities of Rev. Fred Phelps and the Westboro Baptist Church.

Bart McQueary — a Kentucky resident and supporter of the Westboro Baptist Church — filed suit challenging certain portions of HB 333 and SB 93 as unlawful restrictions upon his right to engage in peaceful, non-disruptive, speech protected by the First and Fourteenth Amendments. Specifically, McQueary challenged Sections 5(1)(b) and (c); which provided:

> (1) A person is guilty of interference with a funeral when he or she at any time on any day: ...
>
> (b) Congregates, pickets, patrols, demonstrates, or enters on that portion of a public right-of-way or private property that is within three hundred (300) feet of any event specified in paragraph (a) of this subsection; or
>
> (c) Without authorization from the family of the deceased or person conducting the service, during a funeral, wake, memorial service, or burial:

1. Sings, chants, whistles, shouts, yells, or uses a bullhorn, auto horn, sound amplification equipment, or other sounds or images observable to or within earshot of participants in the funeral, wake, memorial service, or burial; or

2. Distributes literature or any other item.

Pet. App. 30a-31a.

McQueary had previously joined the Westboro Baptist Church in protests in Kentucky and he wished to do so again in the future in a peaceful, non-disruptive manner. *Id.* at 31a. Thus, McQueary sought declaratory and injunctive relief barring the Commonwealth from enforcing Sections 5(1)(b) and (c). McQueary also specifically detailed how he wished to engage in his protest activities; he wanted to: (1) congregate, picket, demonstrate, or enter on that portion of a public right-of-way that is within 300 feet of a funeral, wake, memorial service, or burial, in a manner that is non-disruptive; (2) make sounds and display signs in a non-disruptive manner, within earshot and observable to funeral participants, without seeking or obtaining the approval of the deceased's family or person conducting the service; and (3) distribute literature in a non-disruptive manner without seeking or obtaining permission of the family of the deceased or person conducting the service. Pet. App. 32a.

Based on these uncontested facts, the district court granted McQueary's requested preliminary

injunction finding a substantial likelihood that he would prevail on the merits of his claims. *Id.* at 33a.

Before any further substantive rulings in the case, the Kentucky General Assembly amended KRS Ch. 525, eliminating Sections 5(1)(b) and (c). As a result, the district court dismissed this case as moot. *Id.* at 26a.

Procedural History

On May 1, 2006, McQueary filed suit under 42 U.S.C. § 1983 challenging House Bill 333 and Senate Bill 93 — codified as part of Kentucky Revised Statute (KRS) Ch. 525 — seeking declaratory and injunctive relief. McQueary also sought a preliminary injunction barring the enforcement of the challenged provisions, as well as an award of attorneys' fees pursuant to 42 U.S.C. § 1988. Pet. App. 27a.

The Commonwealth answered and asserted a counterclaim seeking a declaratory judgment that the challenged provisions were valid. The Commonwealth also sought a judgment on the pleadings. The parties then concurrently briefed both issues — McQueary's requested preliminary injunction and the Commonwealth's requested judgment on the pleadings.

On September 26, 2006, the district court entered its Opinion and Order: (1) granting McQueary's preliminary injunction motion; (2) denying the Commonwealth's judgment on the pleadings motion; and (3) entering a preliminary injunction barring the Commonwealth from enforcing the challenged provisions. *Id.*

After the entry of the preliminary injunction (and before any discovery), the Kentucky General Assembly amended KRS Ch. 525 during its 2007 legislative session by removing the challenged (and enjoined) provisions of HB 333 and SB 93. In light of this legislative amendment, the parties agreed that only two questions remained for the district court: (1) whether the repeal of the challenged provisions rendered the case moot; and (2) if so, whether the merits-based preliminary injunction sufficed to confer "prevailing party" status on McQueary under 42 U.S.C. § 1988. Pet. App. 27a.

Consistent with this agreement, the parties proposed, and the district court approved, a simultaneous briefing schedule to submit these two questions for decision. The parties then filed their respective briefs and responses.

On June 26, 2009, the district court entered its Opinion and Order finding that: (1) the legislative repeal of the challenged provisions rendered the case moot; and (2) despite McQueary's attainment of a merits-based preliminary injunction, he was not a "prevailing party" under 42 U.S.C. § 1988 because the preliminary injunction "did not directly benefit" him. *Id.* at 26a-51a. According to the district court, the preliminary injunction rested on an overbreadth analysis that benefitted the speech rights of others, but not McQueary because his intended protest activities were purportedly barred by other, unchallenged, statutes. *Id.* at 49a-50a. And because the preliminary injunction did not directly benefit McQueary, the court found that it was insufficient to change the parties' legal relationship — a necessary

predicate to conferring "prevailing party" status.[1] *Id.* The district court entered its final judgment consistent with this opinion on July 14, 2009. Pet. App. 52a-53a.

On appeal, the Sixth Circuit Court of Appeals rejected the district court's explanations for denying McQueary prevailing party status, reversed the July 14, 2009 judgment, and remanded the case for a "contextual and case specific inquiry" to determine whether the preliminary injunction supported prevailing party status. *Id.* at 1a-25a.

The Court of Appeals specifically rejected the district court's contention that McQueary did not directly benefit from the preliminary injunction ruling. *Id.* at 17a. In doing so, the Circuit Court found that the district court erred in considering what effect, if any, unchallenged statutes had on the question of whether McQueary benefitted from the preliminary injunction ruling, and in relying on the nature of McQueary's success (overbreadth) to deny him prevailing party status. *Id.* at 17a-22a. The Court of Appeals also reversed the district court's denial of a fee award due to "special circumstances" because the district court's opinion inadequately identified the basis for this ruling.[2] *Id.* at 22a-23a.

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[1] The district court alternatively ruled that even if McQueary were entitled to prevailing party status, the requested fee award would be denied due to "special circumstances." Pet. App. 51a.

[2] The Court of Appeals' opinion does not foreclose the possibility that attorneys' fees may be denied McQueary on remand due to special circumstances, but does require that the record contain a sufficient justification for doing so in order to be reviewable. Pet. App. 23a.

Despite rejecting all of the district court's bases for denying McQueary prevailing party status, the Sixth Circuit stopped short of ordering judgment in McQueary's favor. Rather, the Court of Appeals remanded the case in order for the district court, in the first instance, to conduct a "contextual and case-specific inquiry" in order to determine whether McQueary is a prevailing party and if so, whether attorneys' fees should be awarded. Pet. App. 23a-24a.

From this decision, Petitioner seeks certiorari so the Court may answer the question left unresolved in *Sole v. Wyner*, 551 U.S. 74 (2007) — "whether, in the absence of a final decision on the merits of a claim for permanent injunctive relief, success in gaining a preliminary injunction may sometimes warrant an award of counsel fees." *Sole*, 551 U.S. at 86.

REASON FOR DENYING THE PETITION

I. This Court Should Await a Final Judgment Concerning McQueary's Prevailing Party Status.

The interlocutory posture of this case renders it an inappropriate vehicle for this Court to consider the issue cited in support of certiorari. Specifically, this case has been remanded to the district court in order to conduct a "contextual and case specific inquiry" into whether its preliminary injunction ruling supports prevailing party status and if so, to determine whether an award of attorneys' fees is appropriate or whether special circumstances justify denying a fee award. Thus, Petitioner's cited reason for why the Court should grant certiorari — to address whether a preliminary injunction, followed by moot-

ness caused by a defendant's conduct, can be sufficient to confer prevailing party status — is, at best, premature until the lower courts have issued a final judgment granting (or denying) prevailing party status in this case. *See Virginia Military Institute v. United States*, 113 S. Ct. 2431, 2432 (1993) (Scalia, J., respecting the denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."); *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & A. R. Co.*, 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari as unripe where Court of Appeals remanded case to district court for contempt hearing); *see also* R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice § 4.18, pp. 224-26 (6th ed. 1986).

As this Court has explained, "many orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters." *American Construction Co. v. Jacksonville, T. & K. W. R. Co.*, 148 U.S. 372, 384 (1893). And upon the conclusion of lower court proceedings, this Court, of course, would be free to review all properly preserved issues for consideration, including the "contextual and case specific inquiry" standard articulated by the Sixth Circuit opinion below. *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001) (Supreme Court jurisdiction extends to "questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals"). Thus, there is no "compelling" reason for the Court to exercise its certiorari jurisdiction at this time. *See Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (noting that the lack of

finality "alone furnished sufficient ground for the denial of the application" for certiorari).

CONCLUSION

For the foregoing reason, the petition for a writ of certiorari does not present a sufficiently compelling justification warranting the Court's review at this time. Thus, McQueary respectfully requests that the petition be denied.

Respectfully submitted,

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